THE LOVING DECISION AND THE FREEDOM TO MARRY

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The United States Supreme Court has recently entered the area of marriage control by holding that a Virginia anti-miscegination statute violated constitutionally-protected rights. The author traces the meaning of this decision through the maze of state regulatory systems, reaching some very unconventional conclusions and proposals and illustrating the need for a total rethinking of the role of the state in marriage regulations.

The implications of *Loving v. Virginia*,[1] decided by the United States Supreme Court on June 12, 1967, may be far more important than the actual result which the Court reached. In a unanimous ruling the Court struck down laws in sixteen states which prohibit marriage between members of different races, stating in effect that *any* statutory restriction on the freedom of choice regarding a partner in marriage must, in order to withstand the scrutiny of the Constitution, rest on a reasonable medical or moral ground and fall clearly within the state's competence to regulate the formation of the marriage contract.

The facts of *Loving* and its record in the lower courts made the Supreme Court's invalidation of all anti-miscegenation laws relatively easy. The precise question before the Court involved the marital union of Richard Perry Loving, a white man, and Mildred Jeter, a part-Negro and part-Indian woman. Married validly in the District of Columbia in June of 1958, the Lovings were ordered by a court in Virginia to separate from each other or leave the State.

Chief Justice Warren, speaking for the Court, had no difficulty vacating the felony conviction of the Lovings under Virginia law[2] and categorizing the anti-miscegenation statute as a law based on "invidious racial discrimination . . . designed to maintain White Supremacy."[3] The Chief Justice explained as the background for the Court's decision that the "statutory scheme" rejected "dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War."[4]

In view of the undeniable racist motivation of Virginia's anti-

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1 388 U.S. 1 (1967).

2 VA. CODE ANN. §§ 20-57, 58 & 59 (1950).

3 Loving v. Virginia, 388 U.S. 1, 11 (1967).

4 *Id.* at 6.

miscegenation law the Supreme Court did not really have to confront the question of the limits of the state's power to regulate the freedom of choosing one's spouse; but the Court, in order to justify its interdiction of governmental decrees restricting the right to marry, felt obligated to delineate the nature of the marriage relation and the role of the state in regulating it. The fact that the *Loving* case was the first occasion in American history for the Supreme Court to say anything about the countless laws in every state regulating the formation of the marriage contract may have prompted the Court to move beyond the finding of racism upon which the decision was based.

The Supreme Court of Appeals of Virginia reasoned that marriage is subject to state regulation.[5] Chief Justice Warren concedes that "the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power";[6] but Warren goes on to note that the State of Virginia did "not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment".[7] At a later point in his opinion Chief Justice Warren advances far beyond these bland conclusions and writes as follows:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
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> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival . . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by indivious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[8]

These statements about freedom of choice in marriage, taken from the final two paragraphs of Chief Justice Warren's opinion, are arbuably dicta. On the other hand, one can urge with equal or better reason that they are an essential part of the Court's opinion.

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5 *Id.* at 7.

6 *Id.*

7 *Id.*

8 *Id.* at 12.

In any event the two paragraphs quoted are unprecedented in Supreme Court jurisprudence. For the first time in history the Court has turned its attention to the questions of the "freedom to marry" and the "freedom of choice" in selecting a marriage partner. The Court has stated eloquently that both these freedoms are "vital personal rights essential to the orderly pursuit of happiness by free men." Long after the actual result reached in the *Loving* decision has become an obscure footnote in the tragic story of the American Negro's struggle for legal equality, the ringing words of the Court about freedom of choice in selecting a spouse will continue to have an impact of enormous significance.

In order to appreciate the monumental importance of the presuppositions suggested by the Court as some of the bases for its decision it will be helpful to explore three topics: (1) The few cases prior to *Loving* in which the Supreme Court touched on legally binding marriage requirements or restrictions; (2) The chaotic state of existing statutory law on such subjects as affinity and consanguinity as impediments to marriage, along with a review of state laws related to mental and medical requirements for marriage; (3) The norms which should guide the state in establishing statutory prohibitions regulating the formation of the marriage contract.

I. The Supreme Court and the Freedom to Marry Prior to Loving

In the cases[9] of the last century in which the Supreme Court refused to yield to the Mormons' requests, based on religious convictions, for an easing of the legal ban on polygamy, the Court said surprisingly little about either the nature of the marriage contract itself or the limits of the state's role in establishing minimum standards for the formation of the marriage contract. The decisions of the Court with regard to plural marriages employ some strong rhetoric to defend monogamy and to brand polygamy as "odious among the northern and western nations of Europe."[10] The Court moreover tries to analogize polygamy to the custom of wives throwing themselves on the funeral pyres of their husbands or to the making of human sacrifices as a necessary part of religious worship. Such emotion-laden phrases are hardly conducive to a critical analysis of the nature of marriage.

The *Reynolds* opinion and the decisions which followed it ap-

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9 Reynolds v. United States, 98 U.S. 145 (1878); David v. Beason, 133 U.S. 333 (1890); Mormon Church v. United States, 136 U.S. 1 (1890).

10 Reynolds v. United States, 98 U.S. 145, 164 (1878).

pear to beg the question at issue by assuming that bigamy is per se disruptive of the social order and that the challenged statute requiring monogamy is within the legislative power of Congress. The attitude and language of the Supreme Court in the polygamy cases undoubtedly gave impetus to the Congress which in 1887 enacted legislation providing for a judicial proceeding to terminate the corporate charter of the Mormon Church and for the escheat of its property. The resulting forfeitures were validated by a divided Court in 1890.[11]

The Supreme Court made no reference in *Loving* to the polygamy decisions. Nor, surprisingly, did the Court refer to its ruling in *Griswold v. Connecticut*[12] wherein it invalidated a Connecticut law restricting the sale and use of contraceptives, employing as one of its reasons the privacy and intimacy of marriage. The only three cases concerned in any way with marriage which the Court cited in *Loving* are so tangentially related to the issue of freedom of choice in marriage that their very citation demonstrates dramatically that the Court has never before ruled on any question raised by legal restrictions on the right to marry.

The court's citation of *Maynard v. Hill*[13] at two points in the *Loving* opinion appears to be intended only for the purpose of conceding the bland proposition that "marriage is a social relation subject to the State's police power."[14] *Maynard v. Hill* is, of course, the *locus classicus* for the oft-cited aphorism that "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature".[15] The same opinion, while sustaining by a seven to two split a legislative divorce granted to a husband without notice or knowledge on the part of his wife, is redolent with piety about marriage which the Court calls "the foundation of the family and of society, without which there would be neither civilization nor progress."[16]

The Court's reference to *Meyer v. Nebraska*,[17] without specifying any page of that opinion, is apparently intended to reaffirm the position taken by the *Meyer* Court that the liberty guaranteed in the fourteenth amendment denotes, among other things, "the right

11 Morman Church v. United States, 136 U.S. 1 (1890).
12 381 U.S. 479 (1965).
13 125 U.S. 190 (1888).
14 Loving v. Virginia, 388 U.S. 1, 7 (1967).
15 125 U.S. 190, 205 (1888).
16 *Id.* at 211.
17 262 U.S. 390 (1923).

of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children,* to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[18] (Emphasis supplied.) It would seem that the emphasized words are dicta since they appear in a ruling which invalidated a Nebraska statute prohibiting instruction in any foreign language in both private and public schools to pupils below the ninth grade level.

The Court's double reference in *Loving* to *Skinner v. Oklahoma*[19] is apparently an attempt to incorporate the eloquent language of that decision, which reversed a criminal conviction and a penalty of compulsory sterilization, wherein Mr. Justice Douglas speaking for the Court stated that "[w]e are here dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[20] It is significant to note, however, that the Court's opinion in *Skinner* did not overrule its earlier decision in *Buck v. Bell*[21] which permitted involuntary sterilization on eugenic grounds. Indeed Chief Justice Stone, concurring separately in *Skinner* presumably did not contradict the rest of the *Skinner* opinion when he wrote that "[u]ndoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies."[22] This statement, if still acceptable to a majority of the Court, would obviously have enormous consequences for an age which has witnessed an explosion in mankind's knowledge and control of genetics. One may question whether this sweeping statement by Chief Justice Stone can be reconciled with other dicta in the *Meyer* and *Loving* opinions. Raising this question demonstrates once again that the Supreme Court was on an uncharted sea when in *Loving* it undertook, for the first time in history, to rule on the constitutionality of restrictions on a citizen's freedom to marry the person of his choice.

The Court in *Loving* made reference, of course, to its own previous holding in a miscegenation case, *McLaughlin v. Florida*.[23]

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18 *Id.* at 399.
19 316 U.S. 535 (1942).
20 *Id.* at 541.
21 274 U.S. 200 (1927).
22 Skinner v. Oklahoma, 316 U.S. 535, 544 (1942).
23 379 U.S. 184 (1964).

But the carefully qualified opinion in that case, severely restricted to the equal protection argument, categorically stated that the Court invalidated the relevant Florida law "without expressing any views about the State's prohibition of interracial marriage."[24]

Although the Supreme Court made no reference in *Loving* to *Griswold v. Connecticut*,[25] a description of marriage contained in *Griswold* may be significant because it adds to the notion of marriage as a civil contract, status or relationship (concepts employed by the Court in previous decisions) the idea of marriage as a constitutionally-protected "association." Writing for a seven to two majority Mr. Justice Douglas ventured a definition of marriage in the following terms:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[26]

Although actual references in Supreme Court decisions as to the exact legal nature of marriage are rare, one could argue that the Court has to some extent adopted a philosophy of marriage in its numerous decisions about domicile and divorce in the line of cases from *Haddock v. Haddock*[27] to *Vanderbilt v. Vanderbilt*.[28] These decisions, while not expressly concerned with the freedom to marry or with freedom of choice in selecting a spouse, reflect a jurisprudence of marriage whose radiations may be of great significance if *Loving* establishes a series of cases which seek to vindicate the newly-protected freedom to marry the person of one's choice.

As one ponders the enormous implications of the guarantee established in *Loving*, he is amazed that the Supreme Court in all of American history has not dealt with this question prior to 1967. Several reasons can be advanced for this phenomenon, the least debatable of which is the presence in American society and law of a remarkable symbiosis between widely-held sacred and secular views on marriage. Unlike America's law on divorce, which reflects little consensus and great confusion, America's law on the formation of the marriage contract reflects the nation's conviction and faith that marriages are born of love, that they are made in Heaven and that

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24 *Id.* at 196.

25 381 U.S. 479 (1965).

26 *Id.* at 486.

27 201 U.S. 562 (1906).

28 354 U.S. 416 (1957).

the law should at most issue a license and record the date of the happy event.

An example of this faith can be seen in the anomalous arrangement by which clergymen of all kinds may perform marriages along with justices of the peace. Statutes written over a century ago conferring the right to perform marriages on a vast number of public and denominational officials have survived into a vastly different age unchallenged by anyone as violations of the no-establishment-of-religion clause of the first amendment or even as dreadfully drafted and incomprehensible laws. At least one of the reasons that these statutes survive unexamined and unchallenged is the conviction of American society that the freedom to marry the person of one's choice is a right so basic that no law should restrict it or even delay its fulfillment.

The freedom to marry can be restricted by the law either through incentives or inhibitions. The law would restrict or narrow a person's freedom to marry by offering an incentive to marry if, for example, a statute making seduction a crime specified that the inter-marriage of the parties would be a complete defense to the charge of criminal conduct. Such an incentive to marry would surely in certain circumstances diminish the limits of the freedom to marry.

The type of restriction on the freedom to marry which is more usually thought of, however, is not an incentive to marriage but rather an inhibition on the formation of a marriage contract. Such inhibitions result from laws specifying the minimum age required for persons entering marriage, the degrees of affinity and consanguinity within which marriage is forbidden, the necessity for parental consent for minors and the waiting period required after a divorce before entering into a new marriage.

Decisional law in America challenging statutory inhibitions on the freedom to marry is very sparse. Until the *Loving* decision there was little if any speculation about the possibility that the fourteenth amendment might guarantee the freedom to marry. Whether *Loving* will stimulate litigation regarding challenges to the countless legal restrictions on the freedom to marry remains to be seen; however, it is indisputably clear from *Loving* that lawyers and lawmakers have a responsibility to reform the maze of incomprehensible and contradictory laws which restrict the freedom to marry.

II. Statutory Restrictions on the Freedom to Marry

The freedom to marry cannot in modern society be successfully separated from the freedom to marry the person of one's choice.

For modern man, freedom to marry must be synonymous with the right to marry the person one chooses. Any significant factor which places a restraint on this freedom is open to question in the light of *Loving*. Any phenomenon which either induces or inhibits a marriage can be said to be a restraint on the freedom to marry in that such a phenomenon either adds an incentive to marriage which limits the freedom of choice or it narrows the class of individuals available for marriage. It would seem, therefore, that laws which shrink the area of choice in selecting a partner for marriage will be held constitutional only when based on some reasonable medical or moral evidence and intended to regulate some aspect of marriage which is within the police power of the state.

A. *Laws Which Induce Marriages*

Laws concerned with seduction, illegitimacy, fornication and bastardy may sometimes tend to induce marriage. Let us examine the impact of these laws in the light of *Loving*.

Thirty-six states make seduction a crime.[29] In more than thirty of these states marriage or an agreement to marry the seducee is a perfect defense for the man accused of seduction. The civil side of seduction, the suit to recover "heart-balm" for the breach of the promise to marry, was abolished on a widespread basis a generation ago.[30] Legislators who repealed laws conferring a right to recover for a broken engagement reasoned that the breach of the relationship between a man and a woman who have agreed to marry each other should not be made the basis of a compensable tort; but curiously this reasoning did not lead to the repeal of laws which made a criminal of the man who promised a girl that he would marry her and on this basis persuaded her to have pre-marital relations.

No one can say with any degree of accuracy how many marriages are hastened or induced by the threat of the use of the criminal sanctions of seduction statutes. If there is a case for retaining any criminal penalties for seduction, the modified form of this crime proposed in the Model Penal Code of the American Law Institute is perhaps a desirable protection of whatever interest the state has to safeguard in this area. The A.L.I. Code provides that:

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29 For a list of the jurisdictions and the relevant statutes see Wadlington, *Shotgun Marriage by Operation of Law*, 1 GA. L. REV. 183 (1967).

30 1 F. HARPER & F. JAMES, THE LAW OF TORTS 628-29 (1956). For a discussion of these statutes see Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 987-88 (1935).

> A male who has intercourse with a female not his wife . . . is guilty of an offense if . . . the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.[31]

This proposed statute does not make marriage a defense and is designed, as the commentary notes, to reach the "case of the Lothario who may be deceiving a series of girls with false promises of marriage."[32]

The usefulness of the Model Penal Code's proposal is open to question, but at least it does not infringe on the freedom to marry, as do existing statutes which practically precipitate marriages by making marriage a perfect defense to a charge of seduction. The constitutionality of statutes which so provide is open to serious doubt in view of the words of Chief Justice Warren in *Loving* that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[33]

1. Illegitimacy Statutes

Every sixteenth child born in the United States is illegitimate.[34] Although an increasing number of states permit the natural father of a child born out of wedlock to recognize and legitimate the child without the requirement of marriage to the mother, the fact is that in virtually all states except Arizona and Oregon some disadvantage devolves on the child born outside a marriage.[35] There is therefore a strong inducement to marry when a man and a woman have conceived a child out of wedlock. The ancient justification for a marriage, "to give the child a name," may not accurately reflect the laws of a state which has liberalized its statutes on the rights of illegitimate children, but the adage remains a potentially powerful and compelling restriction upon a man and a woman with respect to their freedom of choice in marriage. Since the marriage of the parents of a child born outside wedlock is not necessary for the state

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31 MODEL PENAL CODE § 213.3 (1) and (1)(d) (Prop. Off. Draft 1962).

32 MODEL PENAL CODE § 207.4, Comment (Tent. Draft No. 4, 1955).

33 Loving v. Virginia, 388 U.S. 1, 12 (1967).

34 Krause, *The Non-Marital Child — New Conceptions For the Law of Unlawfulness*, 1 FAM. LAW. Q. 1 (June 1967). For a complete review of the law and illegitimates in America see Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

35 Arizona and Oregon have enacted laws which provide for the legal equality of legitimate and illegitimate children. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

to confer upon such child all the benefits received by a legitimate child, a legal arrangement which induces marriages as a device to make a child legitimate is clearly contrary to the thrust of *Loving*.

2. Fornication Statutes

Virtually nothing is known about what influence, if any, the laws which make fornication a crime in some thirty-five states have on anyone's freedom to marry. This absence of knowledge undoubtedly derives in large part from the non-enforcement of these laws. But statutes penalizing fornication, when fortified by, or thought to be fortified by, laws related to seduction, statutory rape and bastardy, may induce a marriage because of the shame or fear of persons accused or about to be accused of a crime.

Consensual conduct of this nature between two persons does not seem to represent an interest which the state by its criminal law should protect. Fornication and adultery have never been criminal acts in England.

Legislation which makes adultery a crime presumably protects the interest of the injured spouse; but the extension of criminal law to the act of adultery cuts many ways. With respect to the freedom to marry, criminal laws against adultery operate to some extent like the seduction and fornication laws in that they tend to make the male party involved a likely object of blackmail and cause pressure on him to divorce and re-marry. At the same time criminal sanctions against adultery tend to weaken the position of a wife involved in such conduct and may, rightly or wrongly, raise a legal question of her moral suitability as a custodian for her children.

3. Bastardy and Paternity Statutes

There are several good reasons why the crime of bastardy or "begetting with child," as some statutes put it, should be abolished. The deterrent effect of these laws is highly doubtful and certainly not provable. The gravamen of the crime is presumably the harm done to the "bastard" rather than to the unwed mother. It is submitted that a civil action of paternity — with the availability of sanctions of criminal contempt for non-payment — sufficiently protects the interest of the state and of the child in this area.

The unavoidable thrust of a criminal statute for bastardy is to constrict the freedom of choice in marriage of the parties involved. A civil suit of paternity initiated by the unwed mother, but implemented in fact by the court, would if properly arranged tend to teach the couple involved that marriage is not necessarily advisable but that suitable support for the child is the appropriate remedy

for the harm done.

Paternity statutes can sometimes have the same impact as bastardy laws if it is made clear to the unmarried father that he is liable for the support of the child until the child's eighteenth birthday. Although the almost total non-enforcement of these statutory requirements enunciated in the laws of most states is common knowledge in the literature about public assistance laws, such knowledge is not likely to come to the attention of an unmarried father to whom marriage might well appear less unsatisfactory than confronting a period of eighteen years during which he would be obliged to support a child fathered out of wedlock.

The foregoing represent the clear and generally unmistakable legal inducements to marry. To the extent that they restrict the freedom of choice in selecting a spouse they impinge on the newly-guaranteed freedom to marry.

If one views the inducements to marry contained by implication in statutes penalizing pre-marital behavior as relatively unimportant and only dubiously influential on the choice of those persons involved, these potential statutory invitations to marry should be re-examined in light of the powerful forces which have brought about the fact that forty percent of all American brides today are between the ages of fifteen and eighteen.[36] The statutory encouragements to marriage noted above are also relevant to a consideration of the fact that the median age for marriage is at the lowest point in American history and that in urban areas a whole subculture of teenage marriage and divorce has developed.[37]

In surveying the countless legal and non-legal inducements to marry that operate in American culture one is almost instinctively inclined to desire some developments which will slow down the process of easy and early marriages. Most of the less-sophisticated writing about marriage and divorce in America urges the adoption of a restrictive approach by the law in the processes which it requires of those who desire to marry. The remedies proposed, such as a longer waiting period, mandatory pre-marital instruction, and counselling, might be useful in certain cases, but the impact of all laws regulating the conduct of persons desiring to marry is at best speculative. There will probably be more and more attempts made in the near future by civic groups and by legislatures to impose

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36 *Preface* to TEENAGE MARRIAGE AND DIVORCE (S. Farber & R. Wilson ed. 1967).

37 Bohannan, *The Natural History of the Divorced Teen-Ager,* and Furlong, *Easy Marriage, Easy Divorce,* in TEENAGE MARRIAGE AND DIVORCE (S. Farber & R. Wilson ed. 1967).

restrictions, or at least postponements, on young couples who desire to marry. These restrictions will be justified on the basis that the law should favor the stability of marriage, an institution which, in the wistful words of Mr. Justice Douglas, is "coming together for better or for worse, *hopefully enduring.*" (Emphasis supplied.)[38] The desire that marriages be "hopefully enduring" would seem to offer some justification for the imposition of restrictions designed to assist marriages in attaining that quality of endurance; but such restrictions, however well-intentioned, must now pass muster in the light of the freedom to marry guaranteed by *Loving*. Taken literally the freedom of choice protected in *Loving* would seem to take priority over any restriction imposed by the state designed to promote the "hopefully abiding" quality of a marital union. Any such restriction to be constitutional must at least have a rational objective and must be within an area in which the state has a legitimate interest. Under this test many of the existing statutory restrictions on marriage are open to serious question.

B. *Restrictions on the Freedom to Marry*

Restrictions imposed by law on the freedom to marry fall into the following categories: (1) restrictions based on affinity or consanguinity precluding whole classes of persons from inter-marrying; (2) restrictions based on the presumed incompetency of one of the parties to a marriage such as the lack of mental competence; (3) restrictions based on the opposition of the parents of minor children; (4) restrictions based on a policy requiring a mandatory waiting period of six months or a year before a divorced person may remarry.

To discern the underlying rationale behind these various classes of restrictions is not easy and perhaps not really possible. In most instances neither the wording of a statute nor its legislative or judicial history reveal its ultimate intended purpose. In the absence of any discernible and defensible public policy behind such restrictions the presumption arises that the freedom to marry cannot be thus constricted. This is not to say, however, that the freedom to marry is a privilege which cannot be delimited by the state for clearly stated and legitimate reasons; but the state in exercising its role to circumscribe the freedom to marry must limit its power to those few areas where it can forbid (not merely postpone). One instance of a legitimate exercise of this power would be the case where a spouse might communicate a serious infectious disease to his mari-

38 Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

tal partner or to a child of the marriage.

With this suggested norm in mind let us review the categories of restrictions on marriage as noted above.

1. Consanguinity

Statutes prohibiting marriages on the basis of consanguinity (see Appendix A) consistently ban all marriages in the direct lineal line. Some thirty jurisdictions extend this ban to first cousins, while one state (Rhode Island) withdraws its prohibitions in the case of members of the Jewish faith and allows them to marry according to their own religious views on consanguinity and affinity.

The ban on marriages between persons related by consanguinity is presumably grounded on medical evidence that the offspring of such unions tend to be genetically inferior. This evidence has been questioned,[39] but there appears to be no trend or tendency to ease the statutory prohibitions on marriage between blood relatives which exist in every state. Indeed these provisions of the marriage law are reinforced by statutes on incest which not infrequently carry Draconian penalties.

One obvious way to mitigate the inflexible severity of laws prohibiting marriages between blood relatives would be to provide legal machinery to decide upon applications for exemption from the statute. Ecclesiastical courts, as for example in the Catholic Church, will upon request provide for exemption from canon law for the marriage of first cousins. A similar procedure should be available in state courts, especially in cases where a child of a marriage between persons related by consanguinity is unlikely or impossible. The need for a judicial exempting device is particularly urgent where the state forbids a marriage which is allowed by an individual's church, a clear case of state restriction on the free exercise of religion as well as on the freedom to marry a person of one's choice.

2. Affinity Statutes

It seems impossible to find any rationale for the laws in twenty states and the District of Columbia (see Appendix B) which forbid marriage between persons related by affinity, that is, by a relationship based exclusively on marriage. Presumably these laws were enacted to diminish those intra-family tensions which might arise if persons related by affinity within a family circle were free to marry

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39 For references to the scientific evidence see Moore, *A Defense of First-Cousin Marriage*, 10 CLEV.-MAR. L. REV. 136 (1961).

each other after the death or divorce of the spouse of the person sought as a marriage partner. It seems clear that, even if impediments predicated on affinity might have been useful in a previous age when all the members of a family lived within a closed community, statutory restrictions upon the marriage of in-laws appear simply incongruous in today's society.

An inspection of the statutes on affinity reveals the frequent use of ambiguous term "step" to describe a relationship between individuals. In the Connecticut statute, for example, a man may not marry his "stepdaughter." The commonly accepted understanding of the term "stepdaughter" would be to designate the non-adopted daughter of a man's wife. The unprecedented high number of such "stepdaughters" because of frequent re-marriage after divorce in contemporary society is a phenomenon which makes statutes banning marriages between persons related by affinity more far-reaching than one would at first imagine.

The twenty states which make affinity a barrier to marriage are almost exclusively in the northeastern and southern parts of the nation. It may be, therefore, that only the older states of the union, and thus those more likely to reflect a sectarian influence in their law, have statutes on affinity as a bar to marriage. If religious groups or denominational leaders had any rationale for prohibiting marriages between persons related by affinity, it was not made visible in the laws of that score of states which enacted non-waivable impediments to marriage between persons affiliated by affinity.[40]

One of the unfortunate and distressing features of the laws which preclude marriage on the basis of affinity is the frequent declaration that such marriages shall be "incestuous" or "void." In Iowa, for example, the man who, through an oversight of a clerk issuing a marriage license, is allowed to marry his son's widow enters a marriage which the statute states "shall be void."[41] Most of the statutes moreover make no provision for an in-state validation of a marriage contracted elsewhere but declared "void" in the state where, for example, one of the parties to the marriage dies. The surviving spouse to such a marriage may well be faced with litigation if the prospective heirs of an intestate decedent seek to prove that the decedent's wife is not his widow because her marriage was void.

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40 For an explanation of the origin of affinity as an impediment to marriage and a cogent argument against its continuation see *Proposed Marriage and Divorce Codes for Pennsylvania,* PA. GEN. ASSEMBLY, JOINT STATE GOV'T COMM'N, 18-21 (1961).

41 IOWA CODE ANN. tit. 28 § 595.19 (West 1950).

No "parade of the horribles" is needed to demonstrate that the twenty states with laws on affinity and marriage are perpetuating regulations which, however infrequently they may be enforced, are nonetheless indefensible restraints on the freedom of choice in marriage.

3. Mental and Physical Disqualifications to Marriage

Thirty-four states and Puerto Rico (see Appendix C) impose impediments to marriage based on insanity, feeblemindedness or related disabilities of one of the parties. The first question which must be asked about these statutes is whether they have upon marriage any effect absent in the sixteen states which have no statutes specifying physical or mental disqualifications for marriage. If it were demonstrated that the thirty-four states which seek by law to prevent incompetent persons from contracting marriage are unable or unwilling to achieve this objective under their existing statutes, one could merely advocate the repeal of these useless laws and would not have to be concerned about the restrictions on the freedom to marry which these laws impose. But in the nature of things it seems fair to assume that in all probability laws which forbid the issuance of marriage licenses to whole classes of individuals categorized in such unscientific terms as persons "of unsound mind," "habitual drunkards," "confirmed users of narcotic drugs" or "mental retardates" operate to the detriment of the poor and the disadvantaged. Such laws probably have little, if any, effect on white, middle-class applicants for a marriage license. Aside from this suspected discrimination, however, the statutes are so incredibly incomprehensible that, even if they made available a hearing to parties adversely affected (which they do not), it would be almost impossible in most cases to represent a person refused a license, since the statutes fail to furnish any clear guidelines as to the exact nature of the disabilities for which a marriage license may be denied.

Several features of the laws preventing the marriage of persons with various afflictions would seem to raise fundamental constitutional problems. The requirement, for example, in Nebraska and North Carolina, among other states, that a person of unsound mind must be sterilized before he can obtain a license to marry is surely unjust. Such a law erroneously assumes that certain forms of mental disease are transmitted by heredity and that the state has the right and duty to prevent the procreation of persons affected by such a disease.

Six states, curiously enough, have legislated against granting licenses to marry to persons under the influence of mind-expanding

drugs! Oregon requires that *every* person acquire a statement from a physician that the applicant "is free from . . . drug addiction or chronic alcoholism." Delaware law makes "void" any marriage contracted by a "confirmed user of a narcotic drug," while California, Ohio, Illinois and New Jersey direct the clerk of the marriage bureau to refuse a license to anyone who is under the influence of a "narcotic drug."

Other curiosities abound. In Delaware a "marriage between paupers is prohibited," while in Vermont a "town pauper" may not marry" without the written consent of the selectman or overseer of the poor . . . ."! A few states still restrict the right of an epileptic to marry, although tuberculosis as an impediment has all but disappeared.

The best that one can say about the laws in the thirty-four states which prevent the marriage of persons allegedly incompetent to form the contract of marriage is that they are the institutionalization of myths about mental illness and its transmission by a former generation.

Paradoxically the condition which furnishes the most cogent justification for forbidding a marriage — the presence of infectious venereal disease — is not usually written into the laws of those thirty-four jurisdictions which have established minimum standards of health required of those who apply for a license to marry. Apparently all states require a serological test, but a marriage license may be issued even if the test reveals the existence of a communicable venereal disease. How often the marriage of a person with such a disease occurs cannot be known, but the failure to tie in the medical test with marriage licensing statutes is another manifestation of the apathy and ignorance of legislators with respect to laws regulating the formation of the marriage contract.

4. Restrictions Based on the Opposition of the Parents of Minors

Legal impediments to the marriage of under-aged youths and to recently divorced adults are technically not prohibitions of marriage, but only postponements. Nonetheless these restrictions interfere with an individual's freedom to marry, which, like other constitutionally protected guarantees, may not be repressed by law for any notable period of time without a justification that is proportionate to the liberty restrained.

Laws requiring the consent of parents to the marriage of minors appear on first sight to provide an eminently reasonable means of furnishing guidance to non-age youths as well as assisting parents

to protect their children from ill-advised marriages. Further analysis of these laws raise the most fundamental questions about their wisdom and, to a lesser extent, about their constitutionality.

One remedy for problems associated with the marriage of minors without parental consent would be to require only that a parent know of the marriage before it takes place, but not that he consent to it. Requiring as a condition precedent to the issuance of a marriage license that a parent be informed of the intended marriage of a child in the eighteen to twenty-one year old group would give the parent and the minor an opportunity for discussion of the advisability of the marriage sought by the underage child. If the parent after exploring all aspects of the matter with his child is still opposed to the marriage, he has a questionable right at best to have the coercive force of the law prevent the marriage of his son or daughter.

The law itself appears unsure of the extent to which it should enforce parental opposition, since the law does not void the marriage contracted without parental consent but only makes it voidable. If the right to void the non-age marriage rests with one of the spouses, the right of the parent to withhold consent to the marriage is a right that is not particularly meaningful. If, on the other hand, parents have the right to obtain an annulment of an underage marriage, the erosion of the freedom to marry is clear. In 1931, Vernier, in his compilation of statutes on marriage, reported fourteen states which permit a parent to bring such an action.[42] The inconsistency of these laws with the thrust of the *Loving* decision need not be elaborated.

The Proposed Marriage Code for Pennsylvania[43] would continue the requirement of parental consent for marriage by minors, but with judicial authorization to issue a license if "it is in the best interest of the applicant." The same Code, however, would make meaningful the right of the parent to object by permitting him to petition for an annulment within sixty days after the unauthorized marriage.[44] This proposal, designed to preserve the rights of parents for sixty days after the marriage of their child, may have merit, but one hesitates to think about what such a threat of interference might do to an otherwise viable marriage during its first sixty days of existence.

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42 1 C. VERNIER, AMERICAN FAMILY LAWS 251 (1931); Annot., 150 A.L.R. 609 (1944).

43 *Proposed Marriage and Divorce Codes for Pennsylvania,* PA. GEN. ASSEMBLY, JOINT STATE GOV'T COMM'N (1961).

44 *Id.* § 207 (c).

5. Restrictions on the Remarriage of Divorced Persons

Although only about ten states have interlocutory decrees of divorce, which keep the marriage in existence until a designated amount of time has elapsed after the granting of the decree, a substantial number of states withhold from divorced persons the right to remarry for periods up to a year. The extensive and dreary decisional law about the many legal issues which these laws raise[45] seldom, if ever, reaches the question of what justification, if any, the state can offer for enforcing celibacy for a specified time.

The statutes in this area, like most laws regulating pre-marital conduct, contain elements of fantasy and cruelty. The Virginia Code[46] provides that in "granting a divorce for adultery, the court may decree that the guilty party shall not marry again at any time"! But the same section allows the judge who decreed perpetual celibacy to revoke it "for good cause shown . . . after the expiration of six months." The Iowa Code[47] wistfully reminds ex-spouses that, during the year of their post-divorce celibacy, nothing in the law "shall prevent the persons divorced from remarrying each other."

Some few statutes, like the Virginia law cited above, place an extra penalty on the "guilty" party, but all mandatory postponements of marriage appear to be grounded to some extent in the fault theory of divorce. There appears to be something punitive in the imposition of celibacy although there is also some evidence that these statutes are designed only to provide a "cooling-off period" after a divorce is granted.

If a statute grants a divorce decree which is final but prohibits the parties from remarrying, without any legal machinery for an exemption, the potential conflict with *Loving* is clear. Such a conflict is even more severe if the divorce is granted on a non-fault ground such as insanity and the spouse is still prohibited from remarrying.

Little if any empirical data exists on the impact of laws imposing temporary celibacy on recently divorced persons; however, even if a reliable analysis demonstrated that these laws had a stabilizing influence on the affected ex-spouses and their children, the fundamental question would remain: can the state prohibit, even for a time, competent single persons from entering into marriage

45 For a discussion of remarriage after interlocutory decree, remarriage in violation of prohibitory statutes and their out-of-state consequences see Kingsley, *Remarriage After Divorce*, 26 S. CAL. L. REV. 280 (1953).

46 VA. CODE ANN. § 20-119 (1950).

47 IOWA CODE ANN. tit. 28 § 598.17 (West 1950).

with a person of their choice? The answer to that question may be contained in the words of Chief Justice Warren who wrote in *Loving* that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[48]

III. Norms for Legal Regulation of the Formation of the Marriage Contract

Any attempt to fashion satisfactory guidelines for regulating the substance and form of pre-marriage law must begin with a candid and clear statement regarding what role, if any, the government should play in establishing the minimum standards required for a marriage.

The ultimate purpose of pre-marriage regulations should be to strike a balance between a policy which maximizes the freedom to marry with an attempt to discourage irresponsible persons from contracting marriage. The latter objective has, up to *Loving*, constituted almost the only purpose behind the vast array of statutes specifying which persons may marry and when. At the same time these statutes on pre-marital behavior have been allowed to go unenforced, to be evaded without difficulty and to become substantially archaic. Such developments indicate that the public policy behind these laws is, or has become, ambiguous and that virtually no judicial official with jurisdiction over these matters is able or willing to enforce them.

Loving suggests, but does not make entirely clear, that any statutory restraint on the freedom to marry must be predicated on potential harm to the offspring of the marriage or on some clear and grave moral or medical justification.

In proposing norms for a complete rethinking of American pre-marriage law one is obliged to enter an almost completely uncharted field. Consequently whatever one proposes is likely to be startling, unprecedented and, of course, untried. But the whole area is so bewildering and the challenge of *Loving* so unmistakable that some few guidelines should be attempted. The following observations therefore may be relevant:

First, it is somewhat curious that the law requires the issuance of a marriage *license* rather than the mere registration of a marriage. It is submitted that a registration statute and *not* a license law would be appropriate and desirable. A state-issued license is suitable for such activities as the possession of a gun and the right

48 Loving v. Virginia, 388 U.S. 1, 12 (1967).

to drive a car; but for the exercise of one of the most fundamental of all human rights, the right to be married, the state should not imply (even by careless statutory language) that the right to marry depends on a government-issued "license." The unhappy selection of the term "marriage license" may in fact be one of the many reasons why America has devised neither a useful and comprehensive national standard governing the issuance of marriage licenses nor any systematic nationalized way by which orderly information about marriages may be registered and retrieved when occasion requires.

The suggested marriage registration act would operate on the premise that any person who files a marriage registration form has an inherent right to marry and that the state could not impede the proposed marriage unless a substantial disqualification for regisrtation appeared in the form. In such an event the marriage registration act would not automatically forbid a marriage but would direct the applicants to the appropriate official empowered to grant a variance.

A marriage registration act might have the effect of eliminating common law or non-ceremonial marriage, an arrangement which is still permissible in some fifteen states. Clearly, persons married in a consensual way would be a good deal less resistant to a form of registration than that with which such couples now look on the possibility of securing a marriage license and going through a ceremony of marriage.

A system of marriage registration rather than a marriage licensing arrangement might also lead to the adoption of standardized forms throughout the nation and the gradual transference of the function of registering marriages from the local township level where it now rests to a state-wide bureau.

Second, it seems desirable that statutes regulating the formation of a marriage contract should make it clear that a marriage must be valid or void and cannot be voidable. The whole jungle of statutory and decisional law about the voidability of marriages grew up as a result of the lack of any state agency empowered to dispense with a particular impediment affecting applicants for a marriage license. Ecclesiastical courts and most nations of the earth have a set of qualifications for marriage which, if not dispensed or complied with, will render the marriage void.

The least that American law can do is to provide legislative criteria for marriage with a built-in, easily accessible method of obtaining a dispensation. Such criteria would furnish a norm by which a marriage is automatically and by operation of law either valid or void.

Third, the rights of children and minors may well be a subject which, partly as a result of the decision of *In re Gault*,[49] will soon be receiving unprecedented attention in judicial opinions. The issue of the rights of students to due process in proceedings in which they may be adversely affected is a familiar example of one of the several areas in which the rights of minors are in controversy. Other areas include the rights of the children of divorce, the rights of retarded children who are institutionalized and the rights of children in foster homes.[50]

It seems inevitable that the creative thinking about the rights of persons under the age of twenty-one will turn to the question of their right to contract a marriage with a person of their choice and at a time they prefer. Whether *Loving* will be the first decision in a long line of cases like the series of decisions, for example, which followed *Baker v. Carr*[51] is a speculative question; but clearly *Loving* strikes a blow for freedom in such a way as to make it unlikely that the countless arbitrary statutory restrictions on the right to marry can escape judicial testing.

It is possible that the surge of opinion in favor of guaranteeing more rights to children and minors, when combined in a test case with the full impact of *Loving*, may bring about a judicial opinion which by implication will undermine almost every statutory restriction on the freedom to marry. Those who desire to have a reasonable framework of statutory guidelines for the regulation of the marriages of minors and of other groups deemed to be in need of some protection should rewrite existing laws in this area forthwith or face the distinct possibility of the Supreme Court enunciating principles which would make virtually all laws regarding formation of the marriage relationship of dubious constitutionality. This leads to a final question: what ultimate norms should the state seek in rethinking its entire role in the area of marriage law?

Fourth, the revolution which occurred in England in 1857 when the English Parliament transferred jurisdiction over marriage and divorce from the ecclesiastical courts to the civil tribunals took place in America around the same time, without any apparent resistance and without even the realization that such a transfer was in fact a revolution. England and America might conceivably have resisted countless secularizing forces and, like Israel, have left all

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49 387 U.S. 1 (1967).

50 *Children in the Courts—The Question of Representation*, UNIV. OF MICH. INSTITUTE OF CONTINUING LEGAL EDUCATION (1967).

51 369 U.S. 186 (1967).

matters of marriage and divorce exclusively within the jurisdiction of the rabbinical and ecclesiastical courts.

Despite the abdication or the invasion of the ecclesiastical courts by an American civil law of marriage and divorce more than a century ago, the American law of marriage continues to employ legal concepts and judicial procedures which had their origin in canon law and ecclesiastical tribunals. These concepts and procedures now lack the underlying rationale upon which they were based in a society which viewed marriage and divorce as belonging not to Caesar, but to God. It is not surprising therefore that these concepts and procedures, however familiar and indispensable they may seem to be, actually do not and cannot reflect the reality or regulate the substance of modern marriage and divorce.

There are several points of departure for those who would begin to write a new law of marriage for the citizens of a free society. One can think eugenically and propose that the purpose of marriage laws should be the prevention of the birth of defective or retarded persons. With the explosion of knowledge in the field of genetics such a goal will very shortly be to some extent realizable.

Another approach to marriage law would start with the premise that the law should help individuals, and especially young persons, to resist those impetuous and importunate inclinations which if followed will predictably lead to ill-fated marriages. If one begins with this objective as his ultimate aim, any number of mandatory barriers to marriage can be justified. If on the other hand one feels that marriage law should place its prime emphasis on the rights of the existing or potential children of a marriage, one must logically advocate measures either to stabilize families by making marriage and divorce more difficult or, in the alternative, to increase the availability of judicial procedures for removing children from situations where their rights are not being observed.

None of these theories or any combination of them will produce a jurisprudence for modern marriage which will be satisfactory to any significant element of American society. This fact is of course not surprising in an increasingly pluralistic society in which there is little consensus on even the most fundamental moral and spiritual values. Given such diversity and pluralism the soundest premise upon which marriage law can rest is the determination to maximize the freedom to marry by eliminating all restraints on this freedom upon which no substantial consensus of responsible opinion exists. However inadequate such an approach may appear to many individuals, it is the historic mandate clearly implied in the case of *Loving v. Virginia.*

APPENDIX A

RELATIONSHIPS BY CONSANGUINITY WITHIN WHICH MARRIAGE IS PROHIBITED

	Parents, Child, Grandparents, Brother or Sister, Aunt or Uncle, Nephew or Niece	Great Aunt or Grand Uncle	Grand Niece or Grand Nephew	First Cousin	Second Cousin
ALABAMA	X[1,2*]				
ALASKA	X[3]				
ARIZONA	X[4]			X	
ARKANSAS	X[2,4,5]			X	
CALIFORNIA	X[2,5,6]				
COLORADO	X[2,4,5]				
CONNECTICUT	X				
DELAWARE	X[7]			X	
DISTRICT OF COLUMBIA	X				
FLORIDA	X[8]				
GEORGIA	X[9]				
HAWAII	X[2,5,6]				
IDAHO	X[2,5,6]			X	
ILLINOIS	X[2,4,5]			X	
INDIANA	X	X	X	X[10]	
IOWA	X[11]			X	
KANSAS	X[2,4,5]			X	
KENTUCKY	X[3]			X[10]	
LOUISIANA	X[2,5,12]			X	
MAINE	X				
MARYLAND	X				
MASSACHUSETTS	X				
MICHIGAN	X			X	
MINNESOTA	X[3]	X	X	X[10]	
MISSISSIPPI	X[13]			X	
MISSOURI	X[2,4,5]			X	
MONTANA	X[2,5,6]			X	
NEBRASKA	X[2,5]			X	
NEVADA	X	X	X	X[10]	
NEW HAMPSHIRE	X[14]			X	
NEW JERSEY	X[3,7]				
NEW MEXICO	X[2,4,5]				
NEW YORK	X[2,5]				
NORTH CAROLINA	X[15]			X[16]	
NORTH DAKOTA	X[3,4,5]			X	
OHIO	X	X	X	X[10]	
OKLAHOMA	X[2,6]			X	X
OREGON	X[3]	X	X	X	
PENNSYLVANIA	X			X	
RHODE ISLAND	X[17]				
SOUTH CAROLINA	X				
SOUTH DAKOTA	X[2,5,6]			X	
TENNESSEE	X[3,7]				
TEXAS	X[11]				
UTAH	X[2,5,6]	X	X	X[18]	
VERMONT	X				
VIRGINIA	X[2]				
WASHINGTON	X	X	X	X[10]	
WEST VIRGINIA	X[2]			X[16]	
WISCONSIN	X[3]	X	X	X[10,19]	
WYOMING	X[2,5]			X	

* See notes to Appendix A at 382.

APPENDIX B

RELATIONSHIPS BY AFFINITY WITHIN WHICH MARRIAGE IS PROHIBITED

	Parents wife or Husband's (Stepmother or Stepfather)	Son's Wife Daughter's Husband	Grandfather's Wife, Grandmother's Husband	Grandson's Wife; Granddaughter's Husband	Wife's Mother; Husband's Father	Wife's Daughter; Husband's Son; (Stepchildren)	Wife's Grandmother; Husband's Grandfather	Wife's Granddaughter; Husband's Grandson
ALABAMA	X	X[1]*				X		X
ALASKA								
ARIZONA								
CALIFORNIA								
COLORADO								
CONNECTICUT	X					X		
DELAWARE								
DISTRICT OF COLUMBIA	X	X	X	X	X	X	X	X
FLORIDA								
GEORGIA	X	X			X	X		X
HAWAII								
IDAHO								
ILLINOIS								
INDIANA								
IOWA	X	X		X	X	X		
KANSAS								
KENTUCKY								
LOUISIANA								
MAINE	X	X	X	X	X	X	X	X
MARYLAND	X	X	X	X	X	X	X	X
MASSACHUSETTS	X	X	X	X	X	X	X	X
MICHIGAN	X	X	X	X	X	X	X	X
MINNESOTA								
MISSISSIPPI	X	X[1]				X		X
MISSOURI								
MONTANA								
NEBRASKA								
NEVADA								
NEW HAMPSHIRE	X[1]	X[1]		X[1]	X	X		
NEW JERSEY								
NEW MEXICO								
NEW YORK								
NORTH CAROLINA								
NORTH DAKOTA								
OHIO								
OKLAHOMA	X					X		
OREGON								
PENNSYLVANIA	X	X				X		X
RHODE ISLAND	X[2]	X[2]	X[2]	X[2]	X[2]	X[2]	X[2]	X[2]
SOUTH CAROLINA	X	X	X	X	X	X	X	X
SOUTH DAKOTA	X					X		
TENNESSEE	X	X[3]				X[3]		X[3]
TEXAS	X[1]	X[1]				X		X
UTAH								
VERMONT	X	X	X	X	X	X	X	X
VIRGINIA	X	X[1]				X[4]		X
WASHINGTON								
WEST VIRGINIA	X	X				X[4]		X
WISCONSIN								
WYOMING								

* See notes to Appendix B at 382.

NOTES TO CONSANGUINITY CHART (APPENDIX A)

1. Statute is confined to prohibiting males from marrying the specified female relations and is expressly reciprocal in application.
2. Law specifically applies to half-brother and half-sister.
3. Law applies to all relations of the half-blood.
4. Law prohibits marriage between "grandparents and grandchildren of every degree".
5. Law extends to illegitimate relations.
6. Law prohibits marriage between "ancestors and descendants" of every degree.
7. Law prohibits marriage between a person and his ancestor or descendant.
8. Law prohibits marriage to persons related by lineal consanguinity.
9. Law prohibits marriage within the Levitical degrees of consanguinity.
10. Law prohibits marriage between persons nearer of kin than second cousins (thus prohibiting marriage to great-grandaunt and great-grandniece).
11. Law does not specifically prohibit marriage to grandparent.
12. Law prohibits marriage between persons related to each other in the direct ascending or descending line.
13. Law prohibits marriage of the father to his "legally adopted daughter".
14. The statute does not expressly prohibit marriage of a man to his mother or of children to grandparents.
15. The criminal incest statute prohibits carnal intercourse between grandparents and grandchild; parent and child or stepchild or legally adopted child, or brother or sister of the half or whole blood.
16. Law prohibits marriage between "double first cousins."
17. Law permits marriage among Jews within degrees of affinity and consanguinity allowed by their religion.
18. Law prohibits marriage between persons related to each other within and not including the 5th degree of consanguinity computed according to the rules of civil law.
19. Permits marriage between first cousins where the female has attained the age of 55 years.

NOTES TO AFFINITY CHART (APPENDIX B)

1. In these states and situations the wife with whom marriage is prohibited is described as "widow."
2. Law permits marriage among Jews within degrees of affinity or consanguinity allowed by their religion.
3. Marriage with the lineal descendant of a spouse and with the spouse of any lineal descendant is prohibited.
4. Include spouse's stepchild.

APPENDIX C

COMPILATION OF STATE STATUTES PROHIBITING THE MARRIAGE OF PERSONS RELATED BY AFFINITY

Twenty states and the District of Columbia provide by statute restrictions making affinity a barrier to marriage between persons so related. The text of the statutes and citations are presented below.

ALA. CODE tit. 34, § 1 (1958).

Incestuous marriages forbidden. The son must not marry his mother or stepmother, or the sister of his father or mother. The brother must not marry his sister or half sister, or the daughter of his brother or half brother, or of his sister or half sister. The father must not marry his daughter or granddaughter, or the widow of his son. No man shall marry the daughter of his wife, or the daughter of the son or daughter of his wife; and all such marriages are hereby declared incestuous.

All attempted marriages heretofore entered into by and between a man and the widow of his uncle where the parties are now living together as husband and wife are hereby validated.

CONN. GEN. STAT. REV. § 46-1 (1958).

Kindred who shall not marry. No man shall marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman shall marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson; and, if any man or woman marries within the degrees aforesaid, such marriage shall be void.

D.C. CODE ANN. § 30-101 (1967).

The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings, namely:

First. The marriage of a man with his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter.

Second. The marriage of a woman with her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son.

GA. CODE ANN. § 53-105 (1961).

Degrees of relationship within which marriage prohibited. Marriages between persons related by affinity in the following manner are prohibited, viz.: A man shall not marry his stepmother, or mother-in-law, or daughter-in-law, or stepdaughter, or grand-daughter of his wife. A woman shall not marry her corresponding relatives. Marriages within the Levitical degrees of consanguinity shall be void. Marriages within the degrees prohibited by this section shall be incestuous.

IOWA CODE § 595.19 (1946).

Void marriages. Marriages between the following persons shall be void:

1. Between a man and his father's sister, mother's sister, father's widow, wife's mother's daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter, or sister's daughter.

2. Between a woman and her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daugh-

ter's daughter's husband, brother's son, or sister's son.

3. Between first cousins.

ME. REV. STAT. ANN. tit. 19, § 31 (1964).

Marriages prohibited within certain degrees. No man shall marry his mother, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, sister, brother's daughter, sister's daughter, father's sister or mother's sister. No woman shall marry her father, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother, brother's son, sister's son, father's brother or mother's brother.

MD. ANN. CODE art. 62, §§ 1-3 (1957).

Within what degrees of kindred or affinity marriages to be void. If any person within this State shall marry within any of the degrees of kindred or affinity expressed in the following table, the marriage shall be void.

Same - Enumeration. A man shall not marry:

His grandmother,
His grandfather's wife,
His wife's grandmother,
His father's sister,
His mother's sister,
His mother,
His stepmother,
His wife's mother,
His daughter,
His son's wife,
His sister,
His son's daughter,
His daughter's daughter,
His son's son's wife,
His daughter's son's wife,
His wife's son's daughter,
His wife's daughter's daughter,
His brother's daughter,
His sister's daughter.

A woman shall not marry:

Her grandfather,
Her grandmother's husband,
Her husband's grandfather,
Her father's brother,
Her mother's brother
Her father,
Her stepfather,
Her husband's father,
Her son,
Her daughter's son,
Her husband's son,
Her daughter's husband,
Her brother,
Her son's son

Her son's daughter's husband,
Her daughter's daughter's husband,
Her husband's son's son,
Her husband's daughter's son,
Her brother's son,
Her sister's son.

Marriages between man and niece and woman and nephew prior to 1860. All marriages made and celebrated in or out of this State prior to March 9, 1860, by and between persons related within the following degrees of affinity, to wit: A man and his niece, or a woman and her nephew, are hereby confirmed and made valid to every intent and purpose from the time of the celebration of such marriages, respectively; and every such marriage shall be held and taken by all courts of this State to be good and sufficient in law to all intents and purposes.

MASS. GEN. LAWS ANN. ch. 207, §§ 1, 2 (1955).

Marriage of man to certain relatives. No man shall marry his mother, grandmother, daughter, grand-daughter, sister, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister.

No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother's husband, daughter's husband, grand-daughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother.

MICH. COMP. LAWS §§ 25.3-.4 (1948).

Persons a man cannot marry. No man shall marry his mother, grandmother, daughter, grand-daughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, nor his sister, brother's daughter, sister's daughter, father's sister, or mother's sister, or cousin of the first [1st] degree.

Persons a woman cannot marry. No woman shall marry her father, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, nor her brother, brother's son, sister's son, father's brother, mother's brother, or cousin of the first [1st] degree.

MISS. CODE ANN. §§ 457-58 (1956).

Unlawful marriages—persons shall not marry within the following degrees. The son shall not marry his grandmother, his mother, or his stepmother; the brother his sister; the father his daughter, or his legally adopted daughter, or his granddaughter; the son shall not marry the daughter of his father begotten of his stepmother, or his aunt, being his father's or mother's sister, nor shall the children of brother or sister, or brothers and sisters intermarry being first cousins by blood.

Unlawful marriages—what marriages are incestuous. The father shall not marry his son's widow; a man shall not marry his wife's daughter, or his wife's daughter's daughter, or his wife's son's daughter, or the daughter of his brother or sister; and the like prohibition shall extend to females in the same degrees; and all marriages prohibited by this and the preceding section are incestuous and void.

N. H. REV. STAT. ANN. §§ 457:1-57:2 (1955).

Degrees Prohibited, Men. No man shall marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter, or sister's daughter, father's brother's daughter, mother's brother's daughter, father's sister's daughter or mother's sister's daughter.

Degrees Prohibited, Women. No woman shall marry her father, her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, sister's son, father's brother's son, mother's brother's son, father's sister's son or mother's sister's son.

OKLA. STAT. tit. 43, § 2 (1961).

Consanguinity. Marriages between ancestors and descendants of any degree, of a stepfather with a stepdaughter, stepmother with stepson, between uncles and nieces, aunts and nephews, except in cases where such relationship is only by marriage, between brothers and sisters of the half as well as the whole blood, and first cousins, or second cousins, are declared to be incestuous, illegal, and void, and are expressly prohibited. Provided, that any marriage of first or second cousins heretofore performed in another state authorizing such marriages, which is otherwise legal, is hereby recognized as valid and binding in this state as of the date of such marriage.

PA. STAT. ANN. tit. 48, §§ 1-5 (i) (1957).

Restrictions on the issue of marriage license. No license to marry shall be issued by any clerk of the orphans' court:

(i) To applicants within the prohibited degrees of consanguinity and affinity, which are as follows:

Degrees of Consanguinity

A man may not marry his mother.
A man may not marry his father's sister.
A man may not marry his mother's sister.
A man may not marry his sister.
A man may not marry his daughter.
A man may not marry the daughter of his son or daughter.
A man may not marry his first cousin.
A woman may not marry her father.
A woman may not marry her father's brother.
A woman may not marry her mother's brother.
A woman may not marry her brother.
A woman may not marry her son.
A woman may not marry the son of her son or daughter.
A woman may not marry her first cousin.

Degrees of Affinity

A man may not marry his father's wife.
A man may not marry his son's wife.
A man may not marry his wife's daughter.
A man may not marry the daughter of his wife's son or daughter.
A woman may not marry her mother's husband.
A woman may not marry her daughter's husband.

A woman may not marry her husband's son.

A woman may not marry the son of her husband's son or daughter.

R.I. GEN. LAWS ANN. §§ 15-1-1, -1-2, -1-4 (1956).

Men forbidden to marry kindred.—No man shall marry his mother, grandmother, daughter, son's daughter, daughter's daughter, stepmother, grandfather's wife, son's wife, son's son's wife, daughter's son's wife, wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, sister, brothers' daughter, sister's daughter, father's sister, mother's sister.

Women forbidden to marry kindred.—No woman shall marry her father, grandfather, son, son's son, daughter's son, stepfather, grandmother's husband, daughter's husband, son's daughter's husband, daughter's daughter's husband, husband's father, husband's grandfather, husband's son, husband's son's son, husband's daughter's son, brother, brother's son, sister's father's brother, and mother's brother.

Marriages of kindred allowed by Jewish religion.—The provisions of §§15-1-1 to 15-1-3, inclusive, shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion.

S. C. CODE ANN. § 20-1 (1962).

Who may contract matrimony.—All persons, except mentally incompetent persons, and persons whose marriage is prohibited by this section, may lawfully contract matrimony.

No man shall marry his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister.

No woman shall marry her father, grandfather, son, grandson, stepfather, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother. (1952 CODE § 20-1; 1942 CODE § 8556; 1932 CODE § 8556).

S. D. CODE § 14.0106 (1939).

Void marriages: incestuous relations; parental relationships; mixed race marriages; null and void from beginning. The following marriages are null and void from the beginning:

(1) Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, or aunts and nephews, and between cousins of the half as well as the whole blood, whether the relationship is legitimate or illegitimate;

(2) Every marriage of a stepfather with a stepdaughter or a stepmother with a stepson;

TENN. CODE ANN. § 39-705 (1956).

Incest - Penalty.—No man shall marry or have carnal knowledge of his mother, his father's sister, his mother's sister, his sister, his daughter, the daughter of his brother or sister, the daughter of his son or daughter, his father's wife, his son's wife, his wife's daughter, the daughter of his wife's son or daughter. No woman shall marry or have sexual intercourse

with her father, her father's brother, her mother's brother, her brother, her son, the son of her brother or sister, the son of her son or daughter, her mother's husband, her daughter's husband, her husband's son, the son of her husband's son or daughter.

TENN. CODE ANN. § 36-401 (1956).

Prohibited degrees of relationship.—Marriage cannot be contracted with a lineal ancestor or descendant, nor the lineal ancestor or descendant of either parents, nor the child of a grandparents, nor the lineal descendants of husband or wife, as the case may be, nor the husband or wife of a parent, or lineal descendant.

TEX. PEN. CODE art. 496, 497 (1948).

Who men cannot marry.—No man shall marry his mother, his father's sister or half-sister, his mother's sister or half-sister, his daughter, the daughter of his father, mother, brother or sister or if his half-brother or sister, the daughter of his son or daughter, his father's widow, his son's widow, his wife's daughter or the daughter of his wife's son or daughter.

Who women cannot marry. No woman shall marry her father, her father's brother or half-brother, her mother's brother or half-brother, her own brother or half-brother, her son, the son of her brother or sister or her half-brother or half-sister, the son of her son or daughter, her mother's husband, her daughter's husband, her husband's son, the son of her husband's son or daughter.

VT. STAT. ANN. tit. 15, §§ 1, 2 (1959).

Man forbidden to marry relatives. A man shall not marry his mother, grandmother, stepmother, daughter, granddaughter, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, sister, brother's daughter, sister's daughter, father's sister or mother's sister.

Woman forbidden to marry relatives. A woman shall not marry her father, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother, brother's son, sister's son, father's brother or mother's brother.

VA. CODE ANN. § 20-38 (1950).

Marriage within certain degrees prohibited.—No man shall marry his mother, grandmother, stepmother, sister, daughter, granddaughter, half sister, aunt, son's widow, wife's daughter or her granddaughter or stepdaughter, daughter, or sister's daughter. If any man has prior to June fifteenth, nineteen hundred and ten, married his brother's widow or the widow of his brother's or sister's son or his uncle's widow, or his son's widow or stepdaughter, such marriage is hereby declared to be legal and valid and exempt from the penalties prescribed by existing laws. No woman shall marry her father, grandfather, stepfather, brother, son, grandson, half brother, uncle, daughter's husband, husband's son or his grandson or stepson, brother's son, sister's son, or husband of her brother's or sister's daughter.

W. VA. CODE ANN. §§ 48-1-2, 1-3 (1966).

What relatives a man may not marry; validation of certain marriages. No man shall marry his mother, grandmother, stepmother, sister, daughter, granddaughter, half sister, aunt, son's wife; wife's daughter,

or her granddaughter or stepdaughter, brother's daughter, sister's daughter, first cousin, double cousin, or wife of his brother's or sister's son. If any many has heretofore married his brother's widow, uncle's widow, first cousin or double cousin, such marriage is hereby declared to be legal and valid and exempt from penalties prescribed by former laws.

What relatives a woman may not marry. No woman shall marry her father, grandfather, stepfather, brother, son, grandson, half brother, uncle, daughter's husband, husband's son, or his grandson or stepson, brother's son, sister's son, first cousin, double cousin or husband of her brother's or sister's daughter.

APPENDIX D

COMPILATION OF STATUTES IMPOSING IMPEDIMENTS TO MARRIAGE BASED ON CAPACITY OF THE PARTIES

At least 35 states and Puerto Rico provide by statute impediments to marriage based on insanity, feeble-mindedness and related disabilities. The text of the statutes and citations are set forth below:

ALASKA STAT. § 25.05.150 (1962).

Issuance of license. A marriage license may not be issued unless both of the contracting parties are identified to the satisfaction of the proper licensing officer. . . . If there is no legal objection to the marriage and neither party is under the influence of intoxicating liquor or otherwise incapable of understanding the seriousness of the proceeding, the licensing officer shall issue a license.

CAL. CIV. CODE § 69 (West Supp. 1963).

License; necessity; contents; denial; under age applicants; forms. No license must be granted when either of the parties, applicants therefor, is an imbecile, or insane, or is at the time of making the application, for said license, under the influence of any intoxicating liquor, or narcotic drug.

DEL. CODE ANN. tit. 13, §§ 101 (b) (1) to (b) (7), 101 (c) (1953).

(b) A marriage is prohibited, and is void from the time its nullity is declared by a court of competent jurisdiction at the instance of the innocent party, if either party thereto is—

(1) A person of any degree of unsoundness of mind; (Supp. 1966).

(2) A patient, or has been, in an insane asylum, unless such person first files with the Clerk of the Peace to whom he makes application for a marriage license, a certificate signed by the superintendent of the asylum in which such person is or was a patient, stating that such person is fit to marry, and unless such person in other respects may lawfully marry;

(3) Venereally diseased, or is suffering from any other communicable disease, the nature of which is unknown to the other party of the proposed marriage;

(4) An habitual drunkard;

(5) A confirmed user of a narcotic drug;

(6) Divorced, unless a certified copy of the divorce decree (last decree if he has been divorced more than once), or a certificate of such divorce from the clerk at the court granting the divorce is inspected by the Clerk of the Peace to whom he makes application for a marriage license, and unless such person may in other respects

lawfully marry; and if each decree or certificate cannot be obtained, the Resident Judge at the county where such certificates as may be accepted under the provisions of this sub-division, may grant a certificate of the facts as stated by the applicant and the certificate may, for the purposes of this chapter, be accepted in lieu of a certified copy of a divorce decree; (Supp. 1966).

(7) On probation or parole from any court or institution, unless such person first files, with the Clerk of the Peace to whom he makes application for a marriage license, a written consent to his proposed marriage from the chief officer of such court or institution, or from someone who is appointed by such officer to give such consent, and unless in other respects the applicant may lawfully marry.

(c) A marriage between paupers is prohibited, and is void from the time its nullity is declared by a court of competent jurisdiction at the instance of the innocent party.

GA. CODE ANN. § 53-102 (1961).

Persons able to contract. To be able to contract marriage, a person must be of sound mind; if a male, at least 17 years of age, and if a female, at least 14 years, . . .

ILL. REV. STAT. ch. 89 § 6 (1965).

License - Affidavit - Penalty. All persons about to be joined in marriage must first obtain a license therefor, from the County Clerk of the County in which such marriage is to take place, anything in any general or special law of this State to the contrary notwithstanding, which license must show:

1. Their real and full names, and places of residence.
2. Their ages.

No license may be granted when either of the parties, applicants therefor, is an imbecile, or insane, or is at the time of making the application, or proofs herein required, for said license under the influence of any intoxicating liquor, or narcotic drug. . . .

IND. ANN. STAT. § 44-104 (1965).

Void marriages. The following marriages are declared void:

Second. When either party is insane or idiotic, at the time of such marriage.

IOWA CODE § 595.3 (Supp. 1966).

License. Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case: 5. Where either party is mentally ill or retarded, a mental retardate, or under guardianship as an incompetent.

KAN. STAT. ANN. § 23-120 (Supp. 1967).

Marriage of adjudicated incapacitated persons. No woman under the age of forty-five (45) years, or many of any age, except he marry a woman over the age of forty-five (45) years, either of whom is an adjudged incapacitated person shall hereafter intermarry or marry any other person within this State as long as the such person has not been restored to capacity.

KY. REV. STAT. ANN. § 402.020 (1963).

Other prohibited marriages. Marriage is prohibited and void: (1) With an idiot or lunatic.

ME. REV. STAT. ANN. tit. 19, § 32 (1964).

Persons under disability. No mentally ill or feeble-minded person or idiot is capable of contracting marriage.

MASS. GEN. LAWS ANN. Ch. 207, § 5 (1955).

Insane, etc. Persons incapable of marrying. An insane person; an idiot, or a feeble-minded person under commitment to an institution for the feeble-minded, to the custody or supervision of the department of mental health, or to an institution for mental defectives, shall be incapable of contracting marriage. The validity of a marriage shall not be questioned by reason of the insanity, idiocy or of the feeble-mindedness aforesaid of either party in the trial of a collateral issue, but shall be raised only in a process instituted in the lifetime of both parties to test such validity.

MICH. COMP. LAWS § 25.6 (Supp. 1968).

Marriage; incapacity; venereal disease; legalization of white-African marriages; penalty for marriage of person afflicted with venereal disease; competency of witness; mentally unsound person, certificate, penalty for marriage. Sec. 6. No insane person, idiot, or person who has been afflicted with syphilis or gonorrhea and has not been cured of the same, shall be capable of contracting marriage. All marriages heretofore contracted between white persons and those wholly or in part of African descent are hereby declared valid and effectual in law for all purposes; and the issue of such marriages shall be deemed and taken as legitimate as to such issue and as to both of the parents. Any person who has been afflicted with syphilis or gonorrhea and has not been cured of same, who shall marry [is] guilty of a felony and upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than $500.00 nor more than $1,000.00, or by imprisonment in the State prison not more than 5 years, or by both such fine and imprisonment. In all prosecutions under this act a husband shall be examined as a witness against his wife and a wife shall be examined as a witness against her husband whether such husband or wife consent or not. In all cases arising under this act any physician who has attended or prescribed for any husband or wife for either of the diseases above mentioned shall be compelled to testify to any facts found by him from such attendance. No person who has been confined in any public institution or asylum as [a] feeble-minded, imbecile or insane patient, or who has been adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction shall be capable of contracting marriage without, before the issuance by the county clerk of the license to marry, filing in the office of the county clerk a verified statement from 2 regularly licensed physicians of this State that such person has been completely cured of such insanity, imbecility or feeble-mindedness and that there is no probability that such person will transmit any of such defects or disabilities to the issue of such marriage. Any person of sound mind who shall intermarry with such insane person or idiot or person who has been so confined as [a] feeble-minded, imbecile or insane patient, or who has been so adjudged insane, feeble-minded or an imbecile, except upon the filing of certificate as herein provided, with knowledge of the disability of such person, or who shall advise, aid, abet, cause, procure or assist in procuring any such marriage contrary to the provisions of this section [is] guilty of a felony

and on conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $1,000 or by imprisonment in the State prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment.

MINN. STAT. § 517.03 (Supp. 1967)

Marriages prohibited. No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; excepting re-intermarriage between such parties; nor within six months after either was a party to a marriage which has been adjudged a nullity, excepting intermarriage between such parties; nor between parties who are nearer than second cousins; whether of the half or whole blood, computed by the rules of the civil law; nor between persons either one of whom is imbecile, feeble-minded, or insane; nor between persons one of whom is a male person under 18 years of age or one of whom is a female person under the age of 16 years; provided, however, that mentally deficient persons committed to the guardianship of the commissioner of public welfare may marry on receipt of written consent of the commissioner. The commissioner may grant such consent if it appears from his investigation that such marriage is for the best interest of the ward and the public. The clerk of the district court in the county where the application for a license is made by such ward shall not issue the license unless and until he has received a signed copy of the consent of the commissioner of public welfare.

MISS. CODE ANN. § 461 (Supp. 1966)

Conditions precedent to issuance of license. It shall be unlawful for the circuit court clerk to issue a marriage license until the following conditions precedent have been complied with:

(f) In no event shall a license be issued by the circuit court clerk when it appears to the circuit court clerk that the applicants are, or either of them, is drunk, insane or an imbecile.

MO. REV. STAT. § 451.020 (Supp. 1967)

Certain marriages prohibited—official issuing licenses to certain persons guilty of misdemeanor. All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and Negroes or white persons and Mongolians, and between persons either of whom is insane, mentally imbecile or feeble-minded, are prohibited and declared absolutely void; and it shall be unlawful for any city, county, or state official having authority to issue marriage licenses to issue such marriage licenses to the persons heretofore designated, and any such official who shall issue such licenses to the persons aforesaid knowing such persons to be within the prohibition of the section shall be deemed guilty of a misdemeanor; and this prohibition shall apply to persons born out of lawful wedlock as well as those in lawful wedlock.

MONT. REV. CODES ANN. § 48-105 (1947)

Incompetency of parties to: Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between nieces and uncles, and between aunts and nephews, and between first cousins, and between persons, either of whom is feeble-minded, are incestuous and

void from the beginning, whether the relationship is legitimate or illegitimate.
NEB. REV. STAT. §§ 1-102,-03 (Supp. 1965).

Marriages: when void. Marriages are void (1) when either party has a husband or wife living at the time of the marriage; (2) when either party is insane or an idiot at the time of marriage, and the term idiot shall include all persons who from whatever cause are mentally incompetent to enter into the marriage relation; and (3) when the parties stand in relation to each other of parents and children, grandparents and grandchildren, brother and sister of half as well as whole blood, first cousins when of whole blood; uncle and niece, aunt and nephew; and this subdivision extends to illegitimate as well as legitimate children and relatives.

Parties; minimum age; exception; disqualifications. At the time of the marriage the male must be of the age of eighteen years or upward, and the female of the age of sixteen years or upward except etc. No person who is afflicted with a venereal disease shall marry in this State. No person who has been adjudged an imbecile, or a feebleminded person, or a person who is or has been adjudged afflicted with hereditary epilepsy or hereditary insanity shall marry in this State, until after he or she has submitted to an operation for sterilization.
N. H. REV. STAT. ANN. § 457:10 (Supp. 1965).

Marriage Prohibited. No woman under the age of forty-five years, or man of any age—except he marry a woman over the age of forty-five years,—either of whom is imbecile, feeble-minded, idiotic or insane, shall hereafter intermarry or marry any other person within this State unless permitted by the State Department of Health.
N.J. REV. STAT. § 37:1-9 (Supp. 1967).

When issuance of license prohibited. No marriage license shall be issued when either of the contracting parties, at the time of making application therefor, is infected with gonorrhea, syphilis or chancroid in a communicable stage, is under the influence of intoxicating liquor or a narcotic drug, or is an imbecile or of an unsound mind. Nor shall any such license be issued to a person who is or has been an inmate of an insane asylum or institution for indigent persons, unless it appears that such person has been satisfactorily discharged therefrom.
N.C. GEN. STAT. § 51-3 (Supp. 1967).

Want of capacity; void and voidable marriages. All marriages between . . . persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void.
N.C. GEN. STAT. § 51-9 (Supp. 1967).

Health certificates required of applicants for licenses. . . . And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be mentally competent. [1967 Amendment removed epilepsy as an impediment to marriage.]
N.C. GEN. STAT. § 51-12 (Supp. 1967).

Eugenic sterilization for persons adjudged of unsound mind, etc. If either applicant has been adjudged by a court of competent jurisdiction as being an idiot, imbecile, mental defective, or of unsound mind, unless the applicant previously adjudged of unsound mind has been adjudged

of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry, license to marry shall be granted only after eugenic sterilization has been performed on the applicant in accordance with State laws governing eugenic sterilization.

N.D. CENT. CODE § 14-03-07 (Supp. 1967).

Marriages prohibited. Marriage by a woman under the age of forty-five years or by a man of any age, unless he marries a woman over the age of forty-five years, is prohibited if such a man or woman is a chronic alcoholic, an habitual criminal, a mentally deficient person, an insane person, a person who has been afflicted with hereditary insanity, or with any contagious venereal disease.

OHIO REV. CODE ANN. § 3101.06 (Page 1953).

Denial of license. No marriage license shall be granted when either of the applicants is a habitual drunkard, imbecile, or insane person, is under the influence of an intoxicating liquor or narcotic drug, or is infected with syphilis in a form that is communicable or likely to become communicable.

ORE. REV. STAT. § 106.071 (1953).

Mental and physical prerequisites to marriage license. (1) Before any county clerk issues a marriage license, each applicant therefore shall file with the clerk a medical certificate for marriage license signed by a physician licensed by the State Board of Medical Examiners, except that for an applicant on active duty with the Armed Forces of the United States, the certificate may be signed by a commissioned medical officer of the Armed Forces or Public Health Service of the United States. In the certificate the physician shall certify that:

> (b) In the opinion of the physician, the applicant . . . is free from other communicable venereal diseases, feeble-mindedness, mental illness, drug addiction or chronic alcoholism.

PA. STAT. ANN. tit 48, § 1-5 (d)(e) (Supp. 1967).

Restrictions on the issue of marriage license. No license to marry shall be issued by any clerk of the orphans' court:

> (d) If either of the applicants for a license is weakminded, insane, of unsound mind, or is under guardianship as a person of unsound mind unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.
>
> (c) If either of the applicants is or has been, within five years preceding the time of the application, an inmate of an institution for weakminded, insane, or persons of unsound mind, unless a judge of the orphan's court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

P.R. LAWS ANN. tit. 31, § 235 (1955).

The marriage of any person suffering from insanity, idiocy, syphilis, or from any venereal disease, is hereby prohibited while the disease subsists; and if such marriage is contracted, it may be annulled by the part of the Superior Court of the residence of either of the parties thereto, on petition of the prosecuting attorney of the Superior Court or of an in-

terested party with the intervention of the prosecuting attorney of he part of the Superior Court where the act is filed; provided, that the action for nullity cannot be exercised when the case of nullity has disappeared at the time of the action is instituted.

The action for nullity cannot be exercised during the pregnancy of the wife. When a marriage is declared void by virtue of the provisions of the law, the children begotten therein shall be legitimate children. R.I. GEN. LAWS ANN. § 15-1-5 (1956).

Bigamous marriages void—Marriage of lunatics and idiots. Any marriage . . . where either of the parties thereto shall be an idiot or a lunatic at the time of such marriage, shall be absolutely void, and no dower shall be assigned to any widow in consequence of such marriage, and the issue of such marriage shall be deemed illegitimate and subject to all the disabilities of such issue.
S.C. Code Ann. §20-1 (1962)

Who may contract matrimony.—All persons, except mentally incompetent persons, . . . may lawfully contract matrimony. . . .
S.D. CODE § 30.0412 (1939).

List of feeble-minded maintained at marriage license agencies: duty of State Commission; duties of clerk of courts, secrecy of list. The State Commission shall file with the clerk of courts of each county and with any other marriage license issuing agency now or hereafter provided in any county of the State, a complete list of all persons found by the subcommissions of the various counties to be feeble-minded and resident within the State; which list shall be revised and supplemented from time to time by the State Commission; and it shall be the duty of such clerk of courts, or any others who may legally issue a marriage license, to revise and supplement their list to accord with such revised or supplemented list as submitted by the State Commission. The clerk of courts shall check all death certificates appearing in his office against all lists submitted by the State Commission to ascertain if such death was that of any person whose name appears upon said lists. If any such death is found to be that of a person whose name is upon such lists, the clerk of courts shall thereupon remove such name from said lists and shall immediately notify the chairman of the State Commission of the death of such party. It shall be unlawful for the clerk of courts or any marriage license issuing agency to allow publication of any such lists submitted by the State Commission.
S.D. CODE § 30.0413 (1939).

Marriage license to feeble-minded prohibited: exception persons incapable reproduction; determination of identity persons with same name as feeble-minded; appeals to Circuit Courts. It shall be unlawful for any clerk of courts or any marriage license issuing agency now existing or hereafter created within the State of South Dakota, to issue a marriage license if the name of either of the contracting parties to a proposed marriage appears upon any of the lists submitted by the State Commission; however, in cases where either of the contracting parties has the same name as one appearing upon such lists but of a different identity, a license shall be issued upon the submission to the clerk of courts and to the State Commission of satisfactory evidence of such identity, or upon submission to the State Commission of evidence satisfactory to said State Commission that either of said contracting parties has been rendered

sterile by an operation for sterilization or is otherwise incapable of procreation.

The party to whom such license is refused may appeal to the Circuit Court of the county in which such license is refused. Such appeal may be perfected by the service of the notice of appeal on said clerk of courts and by filing the same in the office of the clerk of courts, within thirty days after refusal to issue said license.

TENN. CODE ANN. § 36-411 (1956).

Issuance of license to drunks, insane persons or imbeciles forbidden. No license shall be issued when it appears that the applicants or either of them is at the time drunk, insane or an imbecile.

UTAH CODE ANN. § 30-1-2 (Supp. 1965).

Marriages prohibited and void. The following marriages are prohibited and declared void:

(1) With an idiot or lunatic, with a person afflicted with syphilis or gonorrhea that is communicable or that may become communicable.

UTAH CODE ANN. § 30-1-2.1 (Supp. 1967).

Validation of marriage to a person subject to chronic epileptic fits who had not been sterilized.—All marriages, otherwise valid and legal, contracted prior to the effective date of this act, to which either party was subject to chronic epileptic fits and who had not been sterilized, as provided by law, are hereby validated and legalized in all respects as though such marriages had been duly and legally contracted in the first instance.

VT. STAT. ANN. tit. 18, § 5142 (1959).

Restrictions as to minors, incompetent persons, and paupers. A clerk shall not issue a marriage license when either party to the intended marriage is: . . .

(3) Nor when either of the parties to the intended marriage is non compos mentis;

(4) Nor to a person under guardianship without the written consent of such guardian;

(5) Nor in case of a town pauper without the written consent of the selectment or overseer of the poor of each of the towns where the parties reside, or which are liable for their support, and such written consent shall be attached to the original license; . . .

VA. CODE ANN. § 20-46 (1960).

Marriage of habitual criminals, insane persons, and mental defectives. (1) *Definitions.*—The term "habitual criminal" as used in this section shall be construed to mean anyone who has been convicted at least three times of felonious crimes, and the term "hereditary epileptic" shall be construed to mean epileptic either of whose parents is or has been an epileptic.

(2) *Habitual criminals and mental defectives.*—No woman under the age of forty-five years, and no man of any age, unless he marry a woman over the age of forty-five years, either of whom is an habitual criminal, idiot, imbecile, hereditary epileptic or insane person, shall hereafter intermarry or marry any other person within this State.

(3) *Clergymen not to solemnize such marriages.*—No clergyman or other officer authorized by law to solemnize marriages within this State, shall hereafter knowingly perform a marriage ceremony uniting

persons in matrimony, either of whom is an habitual criminal, idiot, imbecile, hereditary epileptic, or insane person, unless it be that the female party to such a marriage is over the age of forty-five years.

(4) *Clerks not to issue license to such persons; evidence to determine disability; certificate of capability to marry*—No clerk of court, whose business it is to issue marriage licenses, shall knowingly issue a license to any applicants either of whom is an habitual criminal, idiot, imbecile, hereditary epileptic, or insane person, unless it be that the female applicant is over the age of forty-five years. The clerk, in the event he is not satisfied as to whether one or both of the parties is or are an idiot, feeble-minded person, imbecile, hereditary epileptic or insane person, shall be authorized to follow the recommendation of the chairman of the board of health of his county or city or some duly authorized practicing physician in the county or city of his selection, and for which examination and report a fee not exceeding two dollars and a half may be charged, to be paid by the party or parties applying for the license, to be paid to the physician making the report and recommendation.

In the event any person applying for such license shall present to the clerk a certificate dated within the preceding thirty days from a qualified physician or superintendent of any mental institution showing that such physician or from an institution for the care and treatment of the mentally ill or mentally deficient, or has improved and in the judgment of such physician or superintendent, is not an idiot, imbecile, hereditary epileptic or insane person and is capable of entering into the marriage relationship, the clerk may issue such license, and be discharged of any liability under the provisions of this section. . . . (Supp. 1967).

VA. CODE ANN. § 20-47 (Supp. 1966).

Marriage of persons adjudged insane or feeble-minded and admitted to State institutions.—If any man or woman shall knowingly marry any person lawfully adjudged to be insane or feeble-minded, as provided in chapter 5 (§37-136 et seq.) of Title 37, and duly admitted as a patient or inmate in any State hospital or colony for the mentally ill or mentally deficient, whether such person be actually confined in a hospital or colony or in the custody of some person on bond or furlough or at large as an escaped patient or inmate, he or she shall be guilty of a misdemeanor, and on conviction thereof shall be confined in jail not exceeding six months or fined not exceeding five hundred dollars or both. Furthermore, if any persons, resident of this State, one of whom has been so adjudged to be insane or feeble-minded and is a lawfuly committed and undischarged patient or inmate of any State hospital or colony for the mentally ill or mentally deficient, as above provided, shall, with the intention of returning to reside in this State, go into another State or country and there intermarry and return to and reside in this State, cohabiting as man and wife, such marriage shall be governed by the same law, in all respects as if it had been solemnized in this State.

WASH. REV. CODE § 26.04.030 (1961).

Criminality, insanity, disease. No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of forty-five years, either of whom is a common drunkard, habitual criminal, imbecile, feeble-minded person, idiot or insane person, or person who has theretofore been afflicted with hereditary insanity, or who is afflicted with pulmonary tuberculosis in its advanced stages, or any contagious

venereal disease, shall hereafter intermarry or marry any other person within this State.
WIS. STAT. § 245.03 (Supp. 1967).

Who shall not marry; divorced persons . . . A marriage may not be contracted if either party has such want of understanding as renders him incapable of assenting to marriage, whether by reason of insanity, idiocy or other causes.
WYO. STAT. ANN. § 20-32 (1957).

Void marriages defined.—Marriages are void without any decree of divorce that may hereafter be contracted in this State: *Second*—When either party is insane or an idiot at the time of contracting the marriage.